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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-29

PEABODY COAL COMPANY,
Petitioner,

vs.

MISSOURI PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Missouri Public Service Company ("Public Service") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion in this case of the Missouri Court of Appeals, Western District ("Court of Appeals"). That opinion is unreported but has been reproduced in Appendix A of the petition for writ of certiorari filed by Peabody Coal Company ("Peabody").

STATEMENT OF THE CASE

This proceeding arises out of an action by Public Service for specific performance of a long-term Coal Supply Agreement ("Agreement") between Peabody, the seller, and Public Service, the buyer. Peabody is a large producer and seller of coal, and Public Service is an electric utility company operating a coal-fired generating station serving customers with electric power in northwest Missouri.

The Agreement, executed in 1967 and operational in June, 1969, required Peabody to supply coal to Public Service's generating plant for a period of ten years. The price escalation provisions agreed upon by the parties escalated the price of coal (1) on the basis of changes in actual costs for certain items (Exhibit 2, ¶¶ 5[A](1)-(4)) and (2) for material and supplies, explosives, electric power and administrative and supervision expense on the basis of changes in the index number for Industrial Commodities shown in the Indexes of Wholesale Prices issued by the United States Department of Labor Bureau of Labor Statistics. ("Industrial Commodities Index") (Exhibit 2, ¶ 5 [A](5)).

Negotiations

In the negotiations leading up to the execution of the Agreement, Peabody drafted and supplied to Public Service the first draft of a long-term coal supply contract, Exhibit 3A. (Tr. 278, 409, 410) In this first draft provided by Peabody, the price of coal would have escalated with and been tied to the actual costs of fifteen different items, including a "catch-all" provision for "costs not enumerated". In addition, Peabody's first draft included an item that would have allowed Peabody to escalate the price of coal for general inflation. (Exhibit 3A, ¶¶ 5[B](1)-(15) and [C]).

Public Service was unwilling to accept Peabody's first proposal, and also Peabody's second proposal, because those drafts would have escalated the price through numerous adjustments and pass-ons without any reasonable limitation. (Tr. 315-16, 414-19, 12).

Charles Veskerna was the Peabody Vice President who negotiated with Public Service for a coal supply contract. With regard to the negotiations for and execution of the Agreement, Veskerna of Peabody testified as follows:

1. The possibility of runaway inflation came across Veskerna's mind as he negotiated for the Agreement with Public Service. (Tr. 282-84).

2. In the negotiations for a coal supply contract with Public Service, which were admittedly at arms-length (Tr. 285), Veskerna wanted to get as much protection for Peabody against possible inflation as he could. (Tr. 285). Accordingly, Veskerna argued with Public Service about the portion of the contract concerning the method of determining cost increases. (Tr. 285).

3. Veskerna would have preferred to have obtained a price revision clause for materials and supplies based on actual costs (Tr. 305-06), rather than on the Industrial Commodities Index, which Veskerna realized might not increase the same way that actual materials and supplies purchased by Peabody would increase. (Tr. 307).

4. Veskerna of Peabody believed that Peabody would be unwilling to accept the contract terms desired by Public Service with respect to price revision (Tr. 293), because Veskerna realized that the contract terms upon which Public Service was insisting would not cover Peabody's entire future costs. (Tr. 293).

5. Veskerna left the decision of whether to accept Public Service's terms to Merle Kelce, President of Peabody, who after deliberation decided to accept the contractual terms desired by Public Service. (Tr. 294; Exhibit 2).

6. Peabody hoped to make up for any possible loss on the Agreement with Public Service by increased mine productivity. (Tr. 289).

7. At the time Public Service was seeking bids on its long-term coal supply agreement, competition was keen among the coal companies. (Tr. 249). Peabody wanted

Public Service's business (Tr. 248), and whether Peabody could make money on the Agreement over a ten-year period was simply a "chance" Peabody had to take. (Tr. 295, 296).

In addition to providing for a base price with factors for escalation, the final draft of the Agreement contained provisions penalizing Peabody if coal delivered to Public Service was not of a specified BTU content. (Ex. 2, ¶ 5[B]; Tr. 520, 521).

The final draft of the Agreement, Exhibit 2, was agreed upon and executed by Peabody and Public Service in 1967.

Renegotiation Attempts By Peabody

After Exhibit 2, the Agreement, was signed in 1967, Peabody did not attempt to change the contract until 1974. (Tr. 327, 328). Veskerna of Peabody then advised Public Service that Peabody's expenses were greater than Peabody liked to see them, and that Peabody was not making the profit it had intended to make on the contract. (Tr. 329, 330). Veskerna's opinion was that "if Peabody does not make money on a contract, Peabody should threaten to shut off the supply of coal. (Tr. 272, 273). Additionally, Peabody had recognized the actual stoppage of shipments as a definite "leverage possibility." (Ex. 18). Accordingly, Veskerna further advised Public Service that if Public Service was not willing to increase the price it was paying, Peabody would have no choice but to shut down the particular mine it used to supply Public Service and to discontinue shipments of coal to Public Service. (Tr. 34, 329, 330).

Peabody knew that in the tight coal market of 1974-75 Public Service could not obtain large amounts of coal elsewhere. In fact, Peabody knew that if it simply shorted Public Service "200,000 tons this year [1974 or 1975], it is Veskerna's opinion that Missouri Public could not make that up on the outside." (Ex. 18).

In addition to demanding a new base price for coal, Peabody demanded that Public Service agree to *all* of the following modifications or additions to the Agreement:

(1) A decrease in the BTU quality of the coal specified in the Agreement (Tr. 381; Ex. 18; Ex. 42, p. 5; Ex. 39, p. 8), and

(2) A price for coal sufficient to give Peabody a "full return" of 15-20% on its investment (Tr. 334-36), and

(3) A "gross equity" (sic—inequity) clause which would call for price adjustment whenever the profit to Peabody was not up to the level Peabody desired (Tr. 381), and

(4) A pricing factor based on the productivity of Peabody's mines (Tr. 381), and

(5) A general inflation clause using an index to take care of depreciation, taxes and profit (Tr. 381), and

(6) A pricing factor tied to actual costs for materials and supplies (Tr. 381), and

(7) A payment for the acquisition of additional reserves (Tr. 532-36; Ex. 39, pp. 3 and 7), despite the fact that reserves more than adequate for Public Service's needs had been committed by Peabody to Public Service in 1967. (Tr. 267-70).

Peabody claimed in support of its renegotiation demands, particularly in the presentation to Public Service which Peabody itself termed a "dog and pony show," that Peabody would not be a "viable" corporation if it could not obtain the demanded price increases from Public Service. (Ex. 65).

While under economic duress due to the threatened cut-off of coal supply during a period of unusually high

demand, Public Service offered a $1 per ton price increase which would have given Peabody, using Peabody's own figures, a profit through the period of the contract up to the time of trial.[1] Peabody refused the offer. (Ex. 41, Tr. 511).

Litigation

After Public Service was advised of a specific date at which time Peabody would cease shipping coal to Public Service, Public Service filed on May 23, 1975 its petition for specific performance of the Agreement and also for damages for breach of the Agreement. By stipulation, a separate trial was held on the issue of specific performance.

The Circuit Court of Jackson County, Missouri entered judgment against Peabody for specific performance and that judgment was affirmed by the Court of Appeals in its judgment and opinion filed on January 29, 1979. (Appendix A to petition).

In the trial court and the Court of Appeals, Peabody asserted that it was excused from the terms of the Agreement by virtue of § 400.2-615 R.S.Mo. (§ 2-615 of the Uniform Commercial Code, as enacted in Missouri). Peabody claimed that the 1973 Arab Oil Embargo and general inflation were unforeseen contingencies not within the reasonable contemplation of the parties at the time the Agreement was executed in 1967. The effect of these so-called

1. Public Service's offer was subject to Missouri Public Service Commission approval and retroactive to January, 1975. By multiplying the number of tons on Exhibit 53 for both 1975 and 1976 (through May) by $1 ($1,262,285), adding to that figure the penalties Peabody incurred over the contract through April 1976 ($1,796,466) (Ex. 61, Tr. 521), and comparing the sum of these two figures ($3,058,751) to Peabody's alleged loss of $3,020,019, it is evident that Peabody would have made a profit of at least $38,732 before penalty charges through May 1976.

contingencies, according to Peabody, made performance of the Agreement "commercially impracticable", thereby excusing Peabody from further performance.

Peabody argued that the effect of the contingencies was a loss to Peabody on the Agreement of $3,020,019. Peabody's Vice President for Contract Administration, Ganey, testified that the contract "penalties" for not meeting BTU specifications "are not the major reason" for Peabody's claimed loss of $3,020,019. (Tr. 521). However, on cross-examination, Ganey of Peabody admitted that the claimed loss of $3,020,019 in Peabody's Exhibit 53 (which Ganey prepared for presentation to the trial court) included price penalties against Peabody for not meeting BTU specifications of the Agreement totalling $1,796,446. (Tr. 521-23). In other words, 60% of Peabody's claimed loss was due to its own inability or unwillingness to supply coal meeting the quality standards of the Agreement.

The Court of Appeals began its consideration of the issue of excuse by commercial impracticability by quoting the relevant statute and making reference to the comments accompanying the statute, with emphasis on particular portions of comment No. 4 as follows:

> 4. *Increased cost alone does not excuse performance* unless the rising cost is due to some unforeseen contingency which alters *the essential nature of the performance.* Neither is a rise or a collapse in the market itself a justification, *for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.* (Emphasis of the Court of Appeals).

The Court of Appeals then enumerated the factors necessary to establish a claim of commercial impractica-

bility under § 400.2-615 R.S.Mo.: "(1) the occurrence of a contingency; (2) the non-occurrence of which was a *basic assumption* upon which the contract was made; (3) by which occurrence further performance has become commercially impracticable." (Emphasis of the Court of Appeals) (Appendix A of the petition, A-10).

In the portion of the opinion wherein the alleged Constitutional deficiencies lie, the Court of Appeals discussed considerations that might be used in applying the statute. The Court of Appeals stated:

> The fact that the statute is drawn in such general terms is to provide flexibility in its application and full scope for the application of equitable principles and considerations with which the doctrine of commercial impracticability is imbued, as recognized in the Transatlantic Financing Corp. decision [Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966)]. When so viewed and applied, a wide variety of commercial situations often unique to the particular case under consideration are subject to scrutiny. This is particularly true in a case such as the one at bar, where the claim of commercial impracticability is based primarily upon the fact that the performance of the contract results in great financial loss to Peabody due to increase in cost of production (due to the causes enumerated) which were not foreseeable at the time the contract was made. In this connection, Peabody argues that in the resolution of this issue, only the contract in litigation should be considered by the court and that the factors of Peabody's financial condition, experience in the production of coal, resources, availability of the raw material (coal reserves) and other factors should be disregarded. This argument is without merit and Peabody cites no authority in support thereof. Those factors have a direct bearing and evidentiary value in determining the question of foreseeability of the occurrence triggering the loss. See e.g. Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F.Supp. 429 (S.D. Fla. 1975). A commercial, governmental or business trend affecting a contract's value which would be foreseeable to a party with wide experience and knowledge in the field and, perhaps, not to a party with less; a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than to a party without them; and, the application of the doctrine and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, outside the strict confines of the contract itself.

However, the holding of the Court of the Appeals was that the occurrences about which Peabody complained, such as the 1973 Arab Oil Embargo and general inflation not sufficiently represented in the Industrial Commodities Index, were not unforeseeable at the time the contract was negotiated. Furthermore, the Court of Appeals found that Peabody simply "made a bad bargain," and that that neither deals with the "basic assumption" on which the contract was negotiated nor alters the "essential nature of the performance" thereunder so as to constitute "commercial impracticability". (Appendix A of the petition, at A-13-14).

In a motion for rehearing and application for transfer to the Supreme Court of Missouri, filed in the Missouri Court of Appeals, Peabody asserted that the Court of Appeals devised two separate rules for determining when a party may be excused from a contract, one for large

sellers and another for small sellers. Peabody alleged a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. (Appendix B of Peabody's Petition, at A-19, 23). The Court of Appeals denied the motion and application without comment, and the Missouri Supreme Court denied without comment both a similar application and a further motion filed by Peabody which would, if granted, have permitted Peabody to move for reconsideration of the motion to transfer. (Appendices E, C, F, D, and G of the petition).

REASONS WHY THE WRIT SHOULD BE DENIED

I. Neither the record nor the opinion below raises the Questions Presented in the petition.

A. The record does not raise the Questions Presented in the petition.

The case at bar turns on its own facts, and Peabody's Statement of the Case provides a severely distorted view of those facts.

Peabody has structured its version of the facts to give the appearance that a showing that Peabody was sufficiently large to complete its performance under the Agreement was determinative of Peabody's liability in the opinion of the Court of Appeals. This was not the case in any sense or to any degree.

Peabody's fact statement implies that Public Service's evidence consisted solely of presenting Peabody's experience in coal production, its available reserves and resources and their value, and Peabody's financial condition. (Petition, p. 7). Peabody clearly attempts to leave the

impression that such information was provided to the Court in an effort to improperly prejudice both the trial court and the Court of Appeals.

It is true that Peabody is the world's largest coal company in tons produced (Tr. 652) and has the world's largest or second largest coal reserves. (Tr. 592-93). It is also true that Peabody has had substantial experience in coal production. Furthermore, it is true that Peabody was a profitable company during the time periods relevant to this case, e.g., in 1974 Peabody quadrupled its profit from 1973 to $29,304,000. (Tr. 562). In addition, the two mines that Peabody used to supply coal to Public Service made a return on investment of 8.1% and 9.4%, respectively, as of May 31, 1974. (Tr. 586, Ex. 21). Such facts were made known to the trial court and Court of Appeals for the following reasons:

1. Peabody asserted in the renegotiation process, particularly in a presentation to Public Service which Peabody itself referred to as a "dog and pony show," that Peabody would not be a "viable" corporation unless it received the demanded price increase from Public Service. (Ex. 65). Peabody also told Public Service that the profit at Peabody's mines which supplied Public Service was inadequate, and that Peabody "would have no choice but to shutdown the mine and discontinue shipments of coal." (Tr. 34). Public Service accordingly believed it was quite relevant to show that the very corporation claiming it would be forced to close its mines and that it would not be "viable" was the same corporation whose profits had quadrupled, whose coal reserves tremendously increased in value due to the energy situation, and whose mines supplying Public Service were making an 8 to 9 percent return on investment.

2. It would be superfluous for a court to mandate performance of a contract when the party to perform did not have the technical or financial ability to do so. Again, it was relevant to introduce evidence concerning Peabody's technical and financial ability to mine and deliver coal.

3. Furthermore, Public Service desired to show that Peabody was not negotiating contracts as if it were a "mom and pop" coal company. Peabody was of a size and sophistication that it would be aware of the major energy developments at the time the contract was negotiated, such as the 1967 Arab Oil Embargo, and further aware that a price index, being an average of prices for a multitude of items, might not accurately reflect price increases for the specific items used by Peabody. Therefore, in connection with the foreseeability of Peabody's so-called "unforeseen contingencies" such as the 1973 Arab Oil Embargo and the Industrial Commodities Index not reflecting Peabody's actual costs, it was relevant for Public Service to introduce evidence of Peabody's size and position in its industry.

4. When Peabody decided to accept the terms of the Agreement, despite the belief of its Vice President Veskerna that it could not make money on the Agreement unless mine productivity increased, Peabody assumed the risk that the Agreement would not be one of its profitable utility coal supply contracts. Peabody's size and financial condition is relevant here because a company the size of Peabody is able to take such a risk for several reasons, one of which is the large number of coal supply contracts to which it is a party. Losses on some contracts of high risk may be offset by unexpectedly high profits on others. Companies of medium or small size in the industry could

probably not afford to take such a risk as Peabody admittedly did on the Agreement with Public Service, since any one particular contract would account for a much larger part of a medium or small company's revenues. It would be particularly inequitable for a large company such as Peabody to underbid smaller companies on contracts, knowing it could rely on its size to protect it from serious financial injury should the contract prove to be unprofitable as predicted by its company officials, and then be excused from the contract when the predicted unprofitability becomes true.

While the facts presented to the trial court and the Court of Appeals concerning Peabody's experience, size and financial condition were certainly relevant, they played a minor role compared to the facts which establish that Peabody, regardless of its size, knowingly and willingly assumed the risks of various occurrences—occurrences about which Peabody now complains.

Peabody's initial draft of the Agreement (Ex. 3A) was prepared with the idea of fully protecting Peabody from the contingencies about which Peabody now complains and every conceivable contingency regarding cost. Nonetheless, realizing that on an arm's length basis it was out-negotiated by Public Service regarding price revisions, and realizing the potential loss situation that could occur, Peabody entered into the contract with Public Service in its final form because it wanted the business. (Tr. 285, 288). To get Public Service's business, Peabody voluntarily shifted from Public Service (per Exs. 3A and 3) and allocated to itself (per the Agreement, Ex. 2) the risks:

1. Of not having a general inflation clause. (Paragraph 5[C] of Exs. 3A and 3).

2. Of not having a "catch-all" provision to cover almost any conceivable cost. (Paragraph 5[B](15) of Ex. 3A).

3. Of not having increases in materials, supplies, explosives, etc., tied to actual changes in unit prices. (Paragraph 5[B] of Exs. 3A and 3).

4. Of having certain costs tied to an index which by definition takes into account increased costs of certain but not all items. (Tr. 307—Peabody knew it was a "chance" that the index would increase the same way its materials and supplies increased.) (Public Service took the risk that costs of items reflected in the index that have nothing to do with mining would cause the index to rise faster than the cost of materials and supplies used in Peabody's operation). (Paragraph 5[A](5) of Ex. 2).

5. Of being able to make up for possible losses through various ways, including increased productivity. (Tr. 289).

6. Of Peabody making money on the contract over a ten-year period. (Tr. 294).

7. Of Peabody being able to meet the BTU specifications and thereby avoiding penalties which created 60% of its alleged loss.

This case turned on its facts—facts which demonstrated that Peabody assumed the risk of a "bad bargain".

B. The opinion below does not raise the Questions Presented in the petition.

Peabody severely misconstrues portions of the opinion of the Court of Appeals.

First, there was no statement in the opinion below that the Court of Appeals "refused to find commercial

impracticability, because in the Court's view, Peabody was able to absorb the loss." (Petition, p. 8). The Court's primary focus was on the issue of the foreseeability of the allegedly unforeseen contingencies, the Court noting that factors such as financial condition and coal production experience were relevant in considering that issue. (The relevance of such factors is demonstrated in Section IA, *supra.*) After focusing on foreseeability, the Court of Appeals then noted that equitable principles "might call for relief in one instance and not in another" based upon factors outside the strict confines of the contract. As an example of such a factor, the Court of Appeals gave that of the degree of hardship on the defendant. Beyond these general comments on possible considerations, the Court of Appeals made no statements concerning the size or financial status of any party to a contract, let alone Peabody.

Second, and perhaps more importantly, the opinion below bases its holding on findings unrelated to Peabody's ability to absorb a loss.

The holding of the Court of Appeals goes straight to the heart of commercial impracticability—(1) the alleged "unforeseen contingencies" were in fact foreseeable; (2) Peabody simply "made a bad bargain"; (3) Peabody's situation did not deal with the "basic assumption" on which the contract was negotiated; and (4) there was no alteration of the "essential nature of the performance." (Appendix A at A-13-14).

The facts made it clear that Peabody knowingly and willingly made a bad bargain, and accordingly, without reference to an ability to absorb the loss and without raising the Questions Presented in the petition, the Court of Appeals found that the trial court properly decreed specific performance.

II. Even if the Questions Presented in the petition were raised by the opinion or record below, the alleged use of the equitable consideration of degree of hardship in determining whether specific performance should be granted against a seller under § 400.2-615 R.S.Mo. does not violate the Fourteenth Amendment to the United States Constitution.

The Court of Appeals acknowledged the basis in equity of the consideration that a "loss to a party with vast resources and amply supply of raw materials to perform a bad bargain would be less harmful than to a party without them." (Appendix A at A-10-11). As stated in 4 J. POMEROY, EQUITY JURISPRUDENCE, § 1405a at 1044 (5th Ed. 1941), the remedy of specific performance must not result in hardship or oppression; the hardship or oppression may be determined from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution, "that is, from external facts or events or circumstances which control or affect the situation of the defendant." The Court of Appeals recognized in its opinion that a party with vast resources may not qualify, in the sound discretion of the court, for equitable consideration based on oppression or hardship—certainly not an unconstitutional position.

The assertion that the long-established equitable principle of considering a party's financial condition violates the Fourteenth Amendment is wholly without merit. Petitioner Peabody accordingly notes it can find no case authority concerning the questions it presents to this Court.

Furthermore, "commercial impracticability" is not defined in § 400.2-615 R.S.Mo. or in the comments thereto, and has been left to be defined in the case law. Despite Peabody's protestations to the contrary, there is no authority

that a party's financial condition may not be considered in determining "commercial impracticability." In fact, all available case authority indicates that a party's financial condition is or may be a relevant consideration. In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975), the court found Gulf's hardship insufficient to qualify for commercial impracticability, in that among other factors, while Gulf's foreign oil costs were up four-fold during 1973-74, Gulf's foreign oil profits went up four-fold in that period. 415 F. Supp. at 440. Also, Gulf's overall profits went up to 25% during that same period. 415 F. Supp. at 441. Just as the degree of hardship can be considered in a common-law evaluation of a right to specific performance, there is no reason, as in the *Gulf* case, that the level of a party's ability to perform cannot be considered in determining what is "commercial impracticability."

Even in the only case relied upon by Peabody for its proposition that financial condition is irrelevant under § 400.2-615 R.S.Mo., the Court refused to rule out the consideration of a party's financial condition in determining whether "commercial impracticability" existed. *Iowa Electric Light & Power Co. v. Atlas Corp.*, 23 U.C.C. Rep. Serv. 1171 (N.D. Ia. 1978, appeal filed with 8th Cir.). In fact, the Court in *Iowa Electric* did consider defendant Atlas Corporation's financial condition because Atlas had its overall profitability in mind in the way it operated under its contract with Iowa Electric. Likewise, Peabody knew that it was not operating at capacity (Tr. 248) and had in mind its overall financial position when it entered into the contract with Public Service. And further, Peabody must have considered its overall condition when it decided to supply more utilities from the mines supplying Public Service, thereby mining harder to reach coal with attendant increased costs. (Tr. 262, 263, 324). While under

narrower circumstances, the court in *Iowa Electric*, just as in *Eastern Air Lines, Inc. v. Gulf Oil Corp., supra*, found it relevant to consider the overall financial condition of the defendant in a "commercial impracticability" case.

Peabody's contention that the term "commercial impracticability" does not allow consideration of a party's financial condition is unsupported by the statute, the comments thereto, and the relevant case authority. What should be considered in determining "commercial impracticability" has been left to the courts, which are thus far unanimous in finding that a party's finincial condition may indeed be relevant in determining "commercial impracticability."

Despite references to nineteenth century case law on due process, Peabody's claim is actually that the Equal Protection Clause of the Fourteenth Amendment has been violated by a classification on the basis of wealth. While Public Service is unable to view the Court of Appeals' opinion as making such a classification, this Court in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973), held that wealth is not a suspect category in applying the Equal Protection Clause of the Fourteenth Amendment. 411 U.S. at 24. Therefore, the test in a wealth discrimination case is that of rationality. Moreover, "[i]n the context of commercial regulation, the [United States Supreme] Court has indicated that the Equal Protection Clause 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.'" 411 U.S. at 104 (dissenting opinion; Marshall, J.). The unique facts of the case at bar, as discussed earlier, and the historical application of equitable principles in cases of specific performance, demonstrate the rationality and relevancy in considering a party's ability to perform in an action for

specific performance under § 400.2-615 R.S.Mo. Accordingly, there is no violation of the Fourteenth Amendment by the opinion of the Court of Appeals.

CONCLUSION

Peabody knowingly and willingly entered into a contract which it knew, and which the Missouri Court of Appeals held to be, a "bad bargain." Peabody wanted Public Service's business, and was willing to take the risk of a loss. Regardless of Peabody's size, the risk was clearly taken and Peabody was able to perform. The facts and opinion are grounded on principles unrelated to a denial of Constitutional rights, and Public Service accordingly requests that Peabody's petition for writ of certiorari be denied.

Respectfully submitted,

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